



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 9, 2011

MEMORANDUM

To: Christopher Hughey
Acting General Counsel

Through: Alec Palmer
Acting Staff Director

From: Patricia Carmona
Chief Compliance Officer

AUDIT REFERRAL # 11-63

Joseph F. Stoltz
Assistant Staff Director
Audit Division

Thomas Hintermister,
Deputy Assistant Staff
Director for Public Financing

Digitally signed by Thomas Hintermister, Deputy Assistant Staff
Director for Public Financing
DN: cn=Thomas Hintermister, o=Federal Election Commission,
ou=Public Financing, email=thinter@fec.gov, c=US
Date: 2011.06.09 10:10:47 -0400

Alex R. Boniewicz
Audit Manager

Alex R
Boniewicz

Digitally signed by Alex R
Boniewicz
DN: cn=Alex R Boniewicz, o=Federal Election Commission,
ou=Audit Division, email=aboniewicz@fec.gov, c=US
Date: 2011.06.09 16:29:41 -0400

By: Tesfai Asmamaw
Lead Auditor

Tesfai Asmamaw

Subject: Freedom's Defense Fund (A09-21) - Referral Matter

On May 25, 2011, the Commission approved the final audit report on Freedom's Defense Fund. The final audit report includes the following matter that is referable:

Finding 1 – Disclosure of Independent Expenditures

All work papers and related documentation are available for review in the Audit Division. Should you have any questions regarding this matter, please contact Jim Miller or Alex Boniewicz at 694-1200.

Attachment: Finding 1 – Disclosure of Independent Expenditures

cc: Lorenzo Holloway

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Disclosure of Independent Expenditures

Summary

During audit fieldwork, the Audit staff reviewed FDF's disbursements for media buys and questioned \$97,896 of the disbursements. Of this amount, FDF had reported \$19,001 as independent expenditures and \$78,895 as operating expenditures. In response to the Interim Audit Report, FDF provided documentation demonstrating that the costs of the independent expenditures were \$62,499. FDF also amended its reports to correctly disclose all but \$11,869 of this amount as independent expenditures. Appropriate 24/48-hour notices were not filed for independent expenditures totaling as much as \$43,498. The Commission approved this finding.

Legal Standard

A. Independent Expenditures. An independent expenditure is an expenditure made for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party or its agents.

A clearly identified candidate is one whose name, nickname, photograph or drawing appears, or whose identity is apparent through unambiguous reference, such as "your Congressman," or through an unambiguous reference to his or her status as a candidate, such as "the Democratic presidential nominee" or "Republican candidate for Senate in this state."

Expressly advocating means any communication that:

- Uses phrases such as "vote for the President" or "re-elect your Congressman" or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge election or defeat of one or more clearly identified candidates; or
- When taken as a whole and with limited references to external events, such as proximity to the election, could be interpreted by a reasonable person only as advocating the election or defeat of one or more clearly identified candidates. 11 CFR §§100.16(a), 100.17 and 100.22.

B. Reporting Independent Expenditures. When independent expenditures to the same person exceed \$200 in a calendar year, the committee must report on Schedule E (Itemized Independent Expenditures):

- Amount;
- Date when the expenditures were made;
- Name and address of the payee;
- Purpose (a brief description of why the disbursement was made);
- A statement indicating whether the independent expenditure was in support of, or in opposition to, a particular candidate, as well as the name of the candidate and

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the office sought (including State and Congressional district, when applicable); and,

- A certification, under penalty of perjury, as to whether the independent expenditure was made in cooperation, consultation or concert with, or at the request or suggestion of, any candidate or authorized committee or agent of such committee. 2 U.S.C. §434(b)(6)(B)(iii) and 11 CFR §104.3(b)(3)(vii).

C. 24/48-Hour Reporting Notices for Independent Expenditures. Political committees and others making independent expenditures at any time during the calendar year—up to and including the 20th day before an election—must disclose this activity within 48 hours of the date on which the public communication is disseminated each time that the expenditure aggregate \$10,000 or more. In addition, independent expenditures that aggregate \$1,000 or more during the last 20 days—up to 24 hours—before an election require disclosure within 24 hours following the dissemination date. 2 U.S.C. §434(d) and (g); 11 CFR §104.4(b).

D. Requirements for Maintaining Records. Reporting committees are required to maintain records that provide, in sufficient detail, the information from which the filed reports may be verified. 11 CFR §104.14(b)(1).

Facts and Analysis

A. Facts

During audit fieldwork, the Audit staff reviewed disbursements made by FDF for media¹. FDF disbursed \$97,896 for certain media buys, reporting \$19,001 as Independent Expenditures on Schedule E and in 24/48-hour notices, and \$78,895 as operating expenditures.

1. Documented Media Buys

An ad, titled "What Murtha Says, Out of Touch" (Murtha ad), was aired in Pennsylvania from 09/22/2008 to 11/03/2008, at a cost of \$60,397. Of this amount, FDF reported \$19,001 as independent expenditures and the remaining \$41,396 as operating expenditures. The ad clearly identified Rep. John Murtha and then-Presidential candidate Barack Obama, and expressly advocated their defeat. The ad also clearly identified then-Presidential candidate John McCain and Vice Presidential candidate Sarah Palin, and advocated their election. The Audit staff concluded that the Murtha ad was an independent expenditure and FDF should have reported it as such and filed the appropriate 24/48-hour notices.

¹ Pursuant to Commission Directive 69, Legal Guidance to the Office of Compliance, the Office of Compliance and the Office of General Counsel submitted a memorandum to the Commission seeking guidance as to whether certain advertisements broadcast by FDF contained express advocacy and the costs were therefore independent expenditures. The Commission was unable to consider the issue within 60 days of that memorandum; therefore, pursuant to Directive 69, the audit report was prepared consistent with the staff analysis. *Commission Directive 69 is Available at http://www.fec.gov/directives/directive_69.pdf*

The Murtha ad begins with a narrator's declaration that "Barack Obama and Jack Murtha have little respect for the people of Western Pennsylvania." It then contains audio clips of Obama and Murtha making negative statements about Western Pennsylvanians. Murtha is heard saying: "There's no question that Western Pennsylvania is a racist area," and Obama is heard saying that Pennsylvanians "get bitter and cling to guns and religion." Next, the text on the screen reads "MURTHA AND OBAMA DON'T REPRESENT OUR VALUES," as the narrator says: "On election day, tell Jack Murtha and Barack Obama what we think of them." The narrator ends with the statement "Vote Republican" while a picture of McCain and Palin appears and the text on the screen reads "VOTE REPUBLICAN TUESDAY, NOVEMBER 4TH."² The ad concluded with an appropriate disclaimer for an independent expenditure.

Of the \$60,397 FDF reported spending on the Murtha ad, FDF provided dissemination information for costs totaling \$34,028. These ads ran from October 21 through November 3, 2008. Notices filed for reported independent expenditures of \$19,001 disclosed a communication date of October 29, 2008, indicating that these notices are related to ads for which dissemination dates were made available. However, the Audit staff was unable to associate the dissemination date and amounts on the 24/48-hour notices with dates and amounts on the supporting documentation. The Audit staff's review of the available information indicated that FDF should have disclosed \$41,396 (\$60,397 - \$19,001) as independent expenditures rather than operating expenditures, and that FDF failed to file 24-hour notices for Murtha ad costs totaling \$15,027 (\$34,028 - \$19,001).

Dissemination information was not provided for the remaining \$26,369 (\$60,397 - \$34,028), which limited the Audit staff evaluation of the 24/48-hour notice requirements. Appropriate 24/48-notices appear to be required and were not filed.

2. Undocumented Media Buys

The Audit staff noted that media expenditures reported as operating expenditures, totaling \$37,499 (\$97,896 - \$60,397), lacked documentation and could not be associated with a specific ad or dissemination date.

B. Interim Audit Report & Audit Division Recommendation

The Audit staff addressed these expenditures at the exit conference and provided the FDF representative with a schedule detailing these expenditures. The FDF representative stated he would review the expenditures and contact the media vendor to request detailed analysis of the media buys. Subsequent to the exit conference, FDF provided some additional documentation, which was considered in the above analysis.

In the Interim Audit Report, the Audit staff recommended that FDF take the following action:

² "[I]t provides in effect a specific directive: vote for these pictured candidates. The fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature." *FEC v. Massachusetts Citizens for Life Inc. ("MCFL")* 479 U.S. 238, 239 (1986); 11 C.F.R. § 100.22(a).

- Provide any other documentary evidence that would demonstrate that these disbursements were not independent expenditures; or
- Provide documentation that details dissemination dates for those media buys that lack such information and, for those expenditures (\$37,499) for which no documentation has been made available;
- Provide documentation that associates these costs with specific media ads and, if the costs are related to the Murtha ad or communications that contain express advocacy, details dissemination dates;
- Submit and implement revised procedures for reporting independent expenditures and for tracking dissemination dates for such expenditures to allow for timely filing of 24/48-hour reporting notices, as required; and
- Amend its reports to correct the reporting of independent expenditures, as noted above.

C. Committee Response to the Interim Audit Report

With respect to the \$37,499 in expenditures lacking documentation to determine the nature of the expense, FDF provided information associating some of these costs with the Murtha ad (\$2,102) and demonstrating that the others (\$35,397) were not independent expenditures.

FDF submitted written procedures for reporting independent expenditures and for tracking dissemination dates for such expenditures to allow for timely filing of 24/48-hour notices, and indicated its intent to implement these procedures immediately.

FDF also amended its reports to disclose additional independent expenditures totaling \$31,629.

FDF's independent expenditures related to the Murtha ad totaled \$62,499 (\$60,397 + \$2,102). FDF disclosed independent expenditures of \$50,630 for the Murtha ad (\$19,001 + \$31,629). FDF did not correctly disclose as independent expenditures the remaining \$11,869 (\$62,499 - \$50,630). Audit staff advised FDF's representative of the difference but received no further explanation.

In connection with the \$62,499 in independent expenditures for the Murtha ad, it appeared that FDF did not file appropriate 24/48-hour notices for independent expenditures totaling \$43,498 (\$62,499 - \$19,001). Of the \$62,499 in independent expenditures for the Murtha ad, FDF was unable to provide dissemination dates for disbursements totaling \$28,471.

D. Draft Final Audit Report

In the Draft Final Audit Report, the Audit Staff acknowledged that amendments were filed, though incomplete; and, that written procedures to be implemented for reporting independent expenditures and tracking dissemination dates were submitted by FDF.

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Commission Conclusion

On May 5, 2011, the Commission considered the Audit Division Recommendation Memorandum, in which, the Audit Division recommended that the Commission adopt a finding that FDF did not disclose all independent expenditures, and did not file all required notices for independent expenditures made.

The Commission approved the Audit Staff recommendation.

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